STATE OF MICHIGAN
IN THE SUPREME COURT

ANILA MUCI,	Supreme Court No. 7/21/05
Plaintiff-Appellee,	Court of Appeals No. 251438
v	Wayne County Circuit Court No. 03-304534-NF
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ~~a foreign corporation,~~	R. Giovanbombi
Defendant-Appellant.	

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129388
APPL

NOTICE OF HEARING

APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

9/27

28205

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ORDERS APPEALED AND RELIEF SOUGHT

This is a first-party no-fault case. Pursuant to an MTLA program to "crush DMEs"[1], Plaintiff's attorney refused to allow his client to undergo a neuropsychiatric examination unless STATE FARM agreed to a laundry list of conditions. The trial court, Hon. Robert Ziolkowski, enthusiastically obliged Plaintiff. On August 25, 2003, he entered a four-page 19-paragraph order (Appendix A) imposing, inter alia, the following conditions:

(a) Plaintiff's attorney or other representative will be allowed to attend the examinations (Appendix A, ¶2), with Plaintiff's attorney being allowed to interrupt the examination whenever he feels the examiner is asking improper questions (id., ¶12).

(b) Plaintiff will be allowed to videotape the examination. (Id., ¶2).

(c) Plaintiff will not be required to provide any information herself as to how she was injured (id., ¶14), or any medical history which (in the opinion of her attorney) is unrelated to the injuries claimed in this lawsuit (id., ¶15). Information which the examiner requires must be obtained through other forms of discovery. (Id., ¶16).

On September 12, 2003, STATE FARM filed a Motion for Rehearing, which was denied in an order entered September 19, 2003.

On December 29, 2003, the Court of Appeals granted STATE FARM's Application for Leave To Appeal.

On July 21, 2005, the Court of Appeals, per Judges Thomas Fitzgerald and Michael Smolenski, issued a published opinion holding: (1) MCL 500.3151 does not confer on a no-fault insurer a substantive right to have a claimant submit to a medical

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[1]"DME" denotes a Defense Medical Examiner, as opposed to an IME, which is an independent medical examiner.

examination; and (2) Judge Ziolkowski did not abuse his discretion in forbidding the neuropsychiatric examiner to obtain an oral history from Plaintiff.

The majority opinion declined to address the first two conditions on the ground that they were first raised in the trial court on rehearing, and that STATE FARM's appellate brief failed to address the standards for rehearings.

The majority did not address STATE FARM's major argument, which was that a trial court may not impose conditions such as these without a particularized showing that they are warranted by the past conduct of the proposed examiner.

Hon. Henry Saad dissented. He wrote that §3151 unambiguously entitles a no-fault insurer to an unconditional medical examination of a claimant. Furthermore, the No-Fault Act itself provides remedies if an insurer abuses its rights under that statute. Judge Saad concluded that the majority opinion fails to honor the Legislature's role in creating the rights and remedies contained in the No-Fault Act.

STATE FARM appeals from the July 21, 2005, Court of Appeals opinion and from the August 25, 2003, trial court order that it affirmed. STATE FARM seeks a holding from this Court that:

(1) In enacting §3151 of the No-Fault Act, the Legislature conferred on no-fault insurers an unconditional right to have a claimant examined by a doctor of the insurer's choice. The courts may not abrogate that right by imposing conditions which the Legislature refused to impose.

(2) Before a trial court can ever impose conditions such as the ones here at issue, a plaintiff must make a particularized showing that they are war-

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ranted by the prior misconduct of the proposed examiner.

(3) An issue first presented in a motion for rehearing filed within the original 21-day appeal period is preserved for appellate review under the standard of review generally applicable to such issues.

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STATEMENT OF QUESTIONS PRESENTED

I. IN A FIRST-PARTY NO-FAULT CASE, CAN A COURT IMPOSE CONDITIONS ON AN EXAMINATION REQUIRED BY MCL 500.3151?

The trial court answered, "Yes".

The Court of Appeals answered, "Yes".

Plaintiff-Appellee contends that the answer should be, "Yes".

Defendant-Appellant contends that the answer should be, "No".

II.A. HAS PLAINTIFF SHOWN GOOD CAUSE WHY HER ATTORNEY OR OTHER REPRESENTATIVE SHOULD BE ALLOWED TO ATTEND THE EXAMINATIONS?

The trial court answered, "Yes".

The Court of Appeals answered, "Yes".

Plaintiff-Appellee contends that the answer should be, "Yes".

Defendant-Appellant contends that the answer should be, "No".

II.B. HAS PLAINTIFF SHOWN GOOD CAUSE FOR ALLOWING AUDIO/VISUAL RECORDING OF THE EXAMINATION?

The trial court answered, "Yes".

The Court of Appeals answered, "Yes".

Plaintiff-Appellee contends that the answer should be, "Yes".

Defendant-Appellant contends that the answer should be, "No".

STATEMENT OF QUESTIONS PRESENTED cont'd

II.C. EVEN IF MCR 2.311 ALLOWED THE COURT TO IMPOSE CONDITIONS, WILL PRECLUDING THE EXAMINERS FROM ASKING QUESTIONS THEY DEEM NECESSARY TO DETERMINE PLAINTIFF'S CONDITION MATERIALLY AND ADVERSELY AFFECT THE ACCURACY AND CREDIBILITY OF THE EXAMINATION RESULTS?

The trial court answered, "No".

The Court of Appeals answered, "No".

Plaintiff-Appellee contends that the answer should be, "No".

Defendant-Appellant contends that the answer should be, "Yes".

III. IS AN ISSUE FIRST PRESENTED IN A MOTION FOR RE-HEARING FILED WITHIN THE 21-DAY APPEAL PERIOD PRESERVED FOR APPELLATE REVIEW UNDER THE STANDARD OF REVIEW GENERALLY APPLICABLE TO SUCH ISSUES?

The trial court did not address this issue.

The Court of Appeals answered, "No".

Plaintiff-Appellee presumably will contend that the answer should be, "No".

Defendant-Appellant contends that the answer should be, "Yes".

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TABLE OF CONTENTS

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INDEX OF AUTHORITIES

CASES **PAGE(S)**

GROSS, NEMETH & SILVERMAN, P.L.C.
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INDEX OF AUTHORITIES cont'd

CASES **PAGE(S)**

GROSS, NEMETH & SILVERMAN, P.L.C.
ATTORNEYS AT LAW
615 GRISWOLD, SUITE 1305 DETROIT, MICHIGAN 48226
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INDEX OF AUTHORITIES cont'd

CASES **PAGE(S)**

STATUTES & COURT RULES

OTHER AUTHORITIES

STATEMENT OF JURISDICTIONAL BASIS

This Court has jurisdiction to decide this appeal pursuant to MCR 7.301(A)(2). This application is timely filed pursuant to MCR 7.302(C)(2)(a).

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STATEMENT OF STANDARD OF REVIEW

This case involves the interpretation and application of a statute to undisputed facts, which is a question of law subject to this Court's de novo review. Roberts v Mecosta County General Hospital, 466 Mich 57, 62 (2002); Robertson v DaimlerChrysler Corp, 465 Mich 732, 739 (2002). **(Issue I).**

This Court reviews discovery orders for abuse of discretion. Bass v Combs, 238 Mich App 16, 26 (1999), lv den, 463 Mich 855 (2000); Traxler v FMC, 227 Mich App 276, 286 (1998). A trial court abuses its discretion when its ruling lacks either a legal basis or a factual basis in the record. E.g., Alken-Ziegler, Inc v Waterbury Headers Corp, 461 Mich 219, 228-29 n 5 (1999); Mulholland v DEC International Corp, 432 Mich 395, 411 (1989). A trial court also abuses its discretion if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. Cleary v The Turning Point, 203 Mich App 208, 210 (1994); Gore v Rains & Block, 189 Mich App 729, 737 (1991). **(Issue II.).**

This Court reviews the interpretation of a Court Rule de novo. Colista v Thomas, 241 Mich App 529, 535 (2000). **(Issue III.).**

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STATEMENT OF FACTS

This is a first-party no-fault case. Plaintiff claims, inter alia, a number of psychological and cognitive injuries resulting from an automobile accident. Defendant appeals from orders entered by Hon. Robert Ziolkowski, Wayne County Circuit Court, imposing several conditions on psychological and psychiatric examinations requested by Defendant. The pertinent facts follow.

Plaintiff was involved in an automobile accident on May 15, 2002. (Complaint, ¶6). She claims to have sustained a number of injuries, including cognitive, psychological, and emotional damage. (Response to Defendant's Motion for Rehearing, p 4). She filed her Complaint on February 11, 2003. (Docket Sheet, No. 1).

Plaintiff's attorney refused to allow Plaintiff to undergo examinations by physicians of Defendant's choosing unless Defendant would stipulate to an order imposing a number of conditions which Defendant found unreasonable and objectionable. (Motion To Compel IME, ¶3). Accordingly, Defendant filed a Motion To Compel Independent Medical Examinations. (Docket Sheet, Nos. 24-25).

Judge Ziolkowski acceeded to Plaintiff's requests and on August 25, 2003, entered an order (Appendix A), which imposed, inter alia, the following conditions:

(a) Plaintiff's attorney or other representative will be allowed to attend the examinations (Appendix A, ¶2), with Plaintiff's attorney being allowed to interrupt the examination whenever he feels the examiner is asking improper questions (id., ¶12).

(b) Plaintiff will be allowed to videotape the examination. (Id., ¶2).

(c) Plaintiff will not be required to provide any information herself as to how she was injured (id., ¶14), or any medical history which (in the opinion of her attorney) is unrelated to the injuries claimed in this lawsuit (id., ¶15). Information which the examiner requires must be obtained through other forms of discovery. (Id., ¶16).

On September 12, 2003, Defendant filed a Motion for Rehearing (Docket Sheet, No. 51), which Judge Ziolkowski denied in an order entered September 19, 2003 (id., No. 56).

On October 10, 2003, Defendant filed an Application for Leave To Appeal to the Court of Appeals. (Record). That Court granted the application in an order entered December 29, 2003. (Id.).

On July 21, 2005, the Court of Appeals, per Judges Thomas Fitzgerald and Michael Smolenski, issued a published opinion holding: (1) MCL 500.3151 does not confer on a no-fault insurer a substantive right to have a claimant submit to a medical examination; and (2) Judge Ziolkowski did not abuse his discretion in forbidding the neuropsychiatric examiner to obtain an oral history from Plaintiff.

The majority opinion declined to address the first two conditions on the ground that they were first raised in the trial court on rehearing, and that STATE FARM's appellate brief failed to address the standards for rehearings.

The majority did not address STATE FARM's major argument, which was that a trial court may not impose conditions such as

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these without a particularized showing that they are warranted by the past conduct of the proposed examiner.

Hon. Henry Saad dissented. He wrote that §3151 unambiguously entitles a no-fault insurer to an unconditional medical examination of a claimant. Furthermore, the No-Fault Act itself provides remedies if an insurer abuses its rights under that statute. Judge Saad concluded that the majority opinion fails to honor the Legislature's role in creating the rights and remedies contained in the No-Fault Act.

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INTRODUCTION

In the following discussion, Defendant will set forth its challenges to all (Issue I.) and each (Issue II.A.-C.) of the conditions which are the subject of this appeal. As a preface to that discussion, Defendant will provide some context to the issues presented.

The conditions which Plaintiff requested from Judge Ziolkowski were a preemptive attack, pursuant to a MTLA-prescribed format (see Appendix B [attached below to Defendant's Motion for Rehearing]), on Defendant's ability to conduct fair and meaningful discovery. Plaintiffs' attorneys are pushing that tactic (with mixed results [see Appendices C, D (attached below to Defendant's Motion for Rehearing)])[2] as "a hot issue before

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[2]Court of Appeals Judge Donofrio, during his tenure on the circuit court bench, characterized these MTLA-form conditions as an attempt "to obfuscate discovery and obfuscate the truth", as "gamesmanship", and (not to put too fine a point on it) as "garbage". (Appendix D, p 4, 5, 8).

Judge Robert Colombo characterized having an attorney present as "unreasonable" because it "totally chills the examination". (Appendix C, p 7).

On the other hand, jurists such as Judge Ziolkowski -- fueled perhaps by his view of defense lawyers as "reluctant . . . to be honest" and "hid[ing] . . . information" (8/8/03 Tr, 12) -- have taken the position that these blanket orders are appropriate (9/19/03 Tr, 6).

In the trial court, Plaintiff's attorneys attached ten orders as Exhibit 6 to their Response to Defendant's Motion for Rehearing, which they represented as demonstrating that a number of judges have imposed similar conditions.

There is no apparent consensus among trial judges as to the general propriety of the conditions under discussion. Judges Colombo and Donofrio apparently view these conditions a bit

(continued...)

every circuit judge" (Appendix C, p 3).

That premeditated obstructionist strategy is contrary to the principles governing discovery and to the pertinent case law. Moreover, in the context of a first-party no-fault action, such conditions are legally unauthorized.

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[2](...continued)
differently than some of the other circuit judges. However, the potential for mischief generated by those who are imposing such conditions militates in favor of this Court's issuing a definitive opinion to end this type of nonsense.

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I. IN A FIRST-PARTY NO-FAULT CASE, A COURT MAY NOT IMPOSE CONDITIONS ON AN EXAMINATION REQUIRED BY MCL 500.3151.

Defendant will first set forth the correct analysis of this issue. In the context thereby provided, he will critique the monumental analytical contortions in which the majority opinion engaged in order to reach the result that it did.

Preservation

This issue was presented at the hearing on Defendant's Motion To Compel Independent Medical Examinations (8/8/03, 4) and in Defendant's September 12, 2003, Motion for Rehearing, Issue I.

Discussion

In §3151 of the No-Fault Act, the Legislature has stated in no uncertain terms that a no-fault claimant **shall** submit to a mental or physical examination when reasonably requested by the insurer:

> "When the mental or physical condition of a person is material to a claim that has been or may be made for past or future personal protection insurance benefits, the person **shall** submit to mental or physical examinations by physicians. A personal protection insurer may include reasonable provisions in a personal protection insurance policy for mental and physical examination of persons claiming personal protection insurance benefits."

MCL 500.3151 (emphasis added).

Consistent with the statute, Defendant's policy includes the following provision:

"The ***person*** making claim also shall:"

* * * *

> "(2) Be examined by physicians chosen and paid by us as often as we reasonably may require. A copy of the report will be sent to the ***person*** upon written request. The ***person*** or his legal representative if the ***person*** is dead or unable to act, shall authorize us to obtain all medical reports and records."

(Appendix E [attached below as Exhibit 9 to Plaintiff's Response to Motion for Rehearing]).

Section 3153 of the Act authorizes a court to issue orders "in regard to the refusal to comply with sections 3151 and 3152". MCL 500.3153(a)-(e). However, there is no provision authorizing the imposition of conditions on the examinations.

The insurer's right to a meaningful examination of the claimant is a substantive right conferred by the above-quoted statute. It cannot be eliminated, eviscerated, or otherwise avoided simply by a claimant's commencing litigation. See, e.g., McDougall v Schanz, 461 Mich 15, 27 (1999) (court rules may not modify substantive law); Shannon v Ottawa Circuit Judge, 245 Mich 220, 223 (1928) (same). Therefore, §3151 governs this issue; MCR 2.311(A) does not. Section 3151 does not provide for court-ordered conditions if the insurer's request was reasonable. The conditions imposed were therefore statutorily unauthorized.

The linchpin of the Court of Appeals majority opinion in the instant case is its holding that §3151 confers no substantive right on a no-fault insurer to have an examination of a claimant conducted by a physician of the insurer's choice. (Appendix J, p 3, 4, 6). From there, the analysis characterizes the issue as

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one arising solely out of the insurance contract[3] which does not give parties the right to dictate how discovery shall proceed. (Id., p 6).

For good measure, the majority then posits that in §3159 of the No-Fault Act, the Legislature conferred authority on trial courts to impose conditions on medical examinations of claimants. Therefore, the majority reasoned, §3151 does not conflict with MCR 2.311. (Id.).

As will be demonstrated below, that analysis is defective at every step.

As noted above, the keystone of the majority's analysis is that §3151 does not convey a right to a medical examination, but only the right to include a policy provision to that effect:

> "Section 3151 refers to a 'mental or physical examination by physicians,' not to an *independent* mental or physical examination by a physician of defendant's choice. The basis of defendant's motion for an *independent* medical examination by a physician of defendant's choice is the following contractual provision in the insurance policy:"
>
> * * * *
>
> "The present case involves a provision in an insurance policy that provides a discovery device to evaluate plaintiff's claim. Defendant did not establish any substantive right under MCL 500.3151 to have a physician of its choice examine plaintiff. Defendant established only a contractual right that can be upheld if it does not contravene the no-fault act."
>
> * * * *

---

[3]Nevertheless, the majority opinion expressly recognized that Defendant's position is ultimately premised on the statute, not on the contract. (Appendix J, p 6 n 7).

"The Legislature clearly has authorized reasonable provisions for medical examinations in insurance policies. MCL 500.3151. The right to include such reasonable provisions in an insurance policy is a substantive right."

(Appendix J, p 3, 4, 6) (emphasis in original).

That interpretation of §3151 utterly ignores the first sentence of the statute. The majority opinion expressly acknowledges that the second sentence of that statute encompasses all of the meaning that the majority ascribes to it:

"The second sentence authorizes the insurer to include 'reasonable provisions' for the examination when the person claims PIP benefits . . . ."

(Appendix J, p 3 n 5).

However, the majority opinion ascribes absolutely no meaning to the first sentence of §3151. That failure violates well-recognized tenets of statutory construction. A court is to give effect to all of the language of a statute. State Farm Fire & Cas Co v Old Republic Ins Co, 466 Mich 142, 146 (2002). No portion of a statutory provision is to be ignored or rendered nugatory. Wickens v Oakwood Healthcare System, 465 Mich 53, 60 (2001)

Analysis of the language which the majority chose to ignore demonstrates beyond question that it conveys on a no-fault insurer the substantive right to a medical examination of a claimant. In the context in which it is used in §3151, the term "submit" denotes acceding to a demand:

"**sub•mit** . . . *tr.* **1.** to yield or surrender (one's self) to the will or authority of another. . . . *intr.* **1.** to yield to the opinion or authority of another;

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give in **2.** to allow one's self to be subjected; acquiesce."

American Heritage Dictionary (2d ed) (Houghton Mifflin Co 1985), p 1212.

"**sub•mit** . . . *v.t.* **1.** to yield (one's self) to the power of another. . . . *v.i.* **4.** to yield one's self to the power of another."

Random House Dictionary (Random House, 1980), p 868.

That meaning is underscored by §3153, which is the provision which sets forth the mechanism for enforcing §3151:

> "A court may make such orders in regard to the refusal to comply with sections 3151 and 3152 as are just, except that an order shall not be entered directing the arrest of a person for **disobeying an order to submit to a physical or mental examination**. The orders that may be made in regard to such a refusal include, but are not limited to:
>
> "(a) an order that the mental or physical condition of **the disobedient person** shall be taken to be established for the purposes of the claim in accordance with the contention of the party obtaining the order.
>
> "(b) an order refusing to allow **the disobedient person** to support or oppose designated claims or defenses, or prohibiting him from introducing evidence of mental or physical condition.
>
> "(c) an order rendering judgment by default against **the disobedient person** as to his entire claim or a designated part of it.
>
> "(d) an order requiring **the disobedient person** to reimburse the insurer for reasonable attorneys' fees and expenses incurred in defense against the claim."

MCL 500.3153 (emphasis added).

The language "disobeying an order" and the repeated references to the claimant as "the disobedient person" necessarily implies a demand from the insurer. The meaning of §3153 is that

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the courts will enforce that demand. It is thus undeniable that §3151 grants a no-fault insurer a substantive, court enforceable right to demand that a claimant submit to an examination by a physician of the insurer's choice.

That being so, it is patent that MCR 2.311 conflicts with §3151. That Rule reads in pertinent part as follows:

> "**(A) Order for Examination.** When the mental or physical condition . . . of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a physical or mental . . . examination by a physician . . . . **The order may be entered only on motion for good cause** with notice to the person to be examined and to all parties. **The order must specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made**, and may provide that the attorney for the person to be examined may be present at the examination."

MCR 2.311(A) (emphasis added). That Rule conflicts with §3151 in two salient respects.

First, the statute provides that the claimant **shall** submit to an examination in accordance with reasonable provisions in the insurer's policy. It conveys a **right** on an insurer to have the examination taken.

The Court Rule is to the opposite effect. It requires the **insurer** to show **good cause**. The insurer's statutory entitlement to the examination is the exact opposite of the implicit presumption of the Court Rule that there is no entitlement absent the insurer's showing of good cause.

Second, the statute explicitly authorizes the insurer to set reasonable conditions for the examination. The Court Rule wrests

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that right from the insurer and requires the court (rather than the insurer) to do so.

That conflict must be resolved in favor of enforcing the statute. The constitutional prerogative of this Court "to establish . . . the practice and procedure in all courts of this State", Const 1963, art 6, §5, is implicated only when a statute prescribes what should occur (or how it should occur) in a court proceeding. See McDougall v Schanz, 461 Mich 15, 26-27 (1999). Section 3151 does not purport to dictate what is to occur in court proceedings. Rather, it defines an insurer's right and a no-fault claimant's obligation regardless whether the claim is in suit or not.

The conflict which exists here involves invoking a Court Rule to nullify a statutory vested right. That conflict should be resolved in favor of the statutory right. McDougall, supra at 27; Shannon v O'Howa Circuit Judge, 245 Mich 220, 223 (1928).

Moreover, even if the statute were characterized as procedural, it would still prevail over the Court Rule. That is so because if a Court Rule contravenes a legislatively declared principle of public policy, the Court Rule must yield. McDougall, supra at 31.

Here, the Legislature has vested no-fault insurers with a right incident to a comprehensive statutory injury reparations scheme: The claimant "**shall** submit to mental or physical examination by physicians". Doing so plainly involves the resolution of competing considerations (the privacy rights of the claimant

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versus the insurer's need for information) in the interest of furthering the statutory purpose. It has nothing to do with court administration. The principle articulated in McDougall therefore compels enforcement of the statutory right.

As Judge Saad pointed out in his dissent, "the Legislature chose not to impose the kind of conditions required by the trial court here". (Appendix J: Dissenting Opinion, p 2). The majority opinion is nothing less than judicial usurpation of legislative prerogative.[4]

At the end of its discussion of this issue, the majority opinion posits that §3159 of the No-Fault Act authorizes courts to impose conditions on medical examinations of claimants. (Appendix J, p 6). That provision (which the opinion pointedly neglects to quote) has nothing to do with medical examinations of claimants.

As was demonstrated above, by its express language §3153 is the mechanism for enforcement of the rights vested in §§3151 and 3152 of the No-Fault Act. Likewise, §3159 is the enforcement mechanism for §3158. The latter statute reads in pertinent part as follows:

> "(1) An employer, when a request is made by a personal protection insurer against whom a claim has been made, shall furnish forthwith . . . a sworn statement of the **earnings** since the time of the accidental bodily injury and for a reasonable period before the

[4]The text discussion obviates the need to discuss the interplay between a contractual provision and the Court Rules governing discovery. The substantive right is conferred by statute; the policy provision merely implements it.

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injury, of the person upon whose injury the claim is based.

"(2) A physician, hospital, clinic or other medical institution providing, before or after an accidental bodily injury upon which a claim for personal protection insurance benefits is based, any product, service or accommodation in relation to that or any other injury, or in relation to a condition claimed to be connected with that or any other injury, if requested to do so by the insurer against whom the claim has been made, (a) shall furnish forthwith a written report of the **history, condition, treatment and dates and costs of treatment** of the injured person and (b) shall produce forthwith and permit inspection and copying of its records regarding the **history, condition, treatment and dates and costs of treatment**."

MCL 500.3158(1)-(2) (emphasis added).

Section 3159 tracks the underscored language word for word:

"In a dispute regarding an insurer's right to discovery of facts about an injured person's **earnings** or about his **history, condition, treatment and dates and costs of treatment**, a court may enter an order for the discovery. The order may be made only on motion for good cause shown and upon notice to all persons having an interest, and shall specify the time, place, manner, conditions, and scope of the discovery. A court, in order to protect against annoyance, embarrassment or oppression, as justice requires, may enter an order refusing discovery or specifying conditions of discovery and may order payments of costs and expenses of the proceeding, including reasonable fees for the appearance of attorneys at the proceedings, as justice requires."

MCL 500.3159.

Thus, §3159 governs disputes between a no-fault insurer and an employer or health care provider as to the insurer's right to certain information. Neither the language nor the structure of §3159 will permit the conclusion that it applies to an insurer's

statutory right to a medical examination of the claimant under §3151.

In short, the conditions imposed by the August 25 order are legally invalid because they are statutorily unauthorized.

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II. EVEN IF MCR 2.311(A) COULD PROPERLY BE INVOKED, THE TRIAL COURT ABUSED ITS DISCRETION BY IMPOSING THE CONDITIONS IN QUESTION WITHOUT A PARTICULARIZED SHOWING OF NEED.

Although Plaintiff's attorneys characterize the conditions in question as necessary to "protect" Plaintiff from examiner misconduct, they made no showing of any need for such precautions with the examiners designated by Defendant in the instant case. In fact, they admit that they did not even know who the examiners were when they requested the MTLA-prescribed conditions.[5] (Plaintiff-Appellee's Brief on Appeal, p 12-13).

The pertinent case law requires a showing of good cause before prophylactic conditions may be imposed.

> "As a general rule, **there exists a presumption that a physician in a personal injury action will conduct properly a physical examination** of the plaintiff."
>
> * * * *
>
> "Nevertheless, that presumption can be overcome by a physician's **documented, long-history of partiality**."

---

[5]Subsequently, Plaintiff produced a report from another case by one of Defendant's proposed examiners in which he had asked the examinee about the status of her lawsuit. (Appendix F, p 6). Plaintiff argued that such inquiries have nothing to do with a proper psychiatric examination.

Unless Plaintiff's attorney has an undisclosed medical degree, he is not qualified to say what is germane to a psychological evaluation in the context of allegedly traumatically induced injuries. The proof of that pudding is that **Plaintiff's neuropsychological consultant specifically asked questions concerning this litigation and the circumstances of the accident**. (Appendix G, p 4). It would thus appear from the record that such inquiries are within the scope of a proper psychiatric evaluation. In any event, Defendant maintains that that single item of evidence falls far short of a showing of a long history of misconduct.

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White v State Farm Mutual Automobile Ins Co, 600 So2d 1, 3 (La App 1996) (emphasis added) (cited by Plaintiff in the Court of Appeals).

> "Second, the trial court should consider evidence that the requested examination might be conducted in an unfair manner. This evidence may include, but should not be limited to: (a) evidence of past physical abuse of examinees by the examiner; (b) evidence of past misrepresentations by the examiner; (c) evidence that the examiner has financial incentives to consider the examinee as an adversary; and (d) evidence that the examiner's testimony is almost always slanted against the examinee, *e.g.*, by showing that the doctor has seldom if ever found an examinee to be disabled.
>
> "**The mere fact that the doctor is being compensated should carry little weight** since virtually all CR35.01 examiners are compensated."

Metropolitan Property & Casualty Ins Co v Overstreet, 103 SW3d 31, 40 (Ky 2003) (emphasis added) (cited by Plaintiff in the Court of Appeals).

> "To establish good cause, that party must submit 'a particular and specified demonstration of fact, as distinguished from stereotype and conclusory statements.'"

Hertenstein v Kimberly Home Health Care, Inc, 189 FRD 620, 624 (D Kan 1999).

Despite the fact that Defendant emphasized the lack of any showing to justify the conditions imposed, the Court of Appeals declined even to address the issue. Defendant does not contend that an appropriately fashioned protective order is never available. However, Defendant maintains that such an order requires a documented, particularized showing that the specific physician has a long history of demonstrated bias against personal injury

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claimants. Insisting on conditions without such a showing cannot be justified as necessary to protect a plaintiff. Instead, it is simply a premeditated scheme to undermine a defendant's ability to defend a case.

The lack of any showing of good cause is common to all three of the conditions to which Defendant objects. To underscore the importance of such a showing, Defendant will discuss the serious problems created by each of the conditions imposed.

A. PLAINTIFF HAS NOT SHOWN GOOD CAUSE WHY HER ATTORNEY OR OTHER REPRESENTATIVE SHOULD BE ALLOWED TO ATTEND THE EXAMINATIONS.

Preservation

This issue was presented in the trial court in Defendant's Motion for Rehearing, Issue II.

Discussion

There is no Michigan case law on point. However, a well-developed body of federal decisions demonstrates that an attorney should virtually never be permitted at a physical or mental examination. Those cases have identified four considerations supporting that conclusion.

First, the presence of an attorney would create an adversarial environment, which is to be avoided in the interest of an effective examination. E.g., Cabana v Forcier, 200 FRD 9, 12 (D Mass 2001); Hertenstein v Kimberly Home Health Care, Inc, supra at 629; Holland v United States, 182 FRD 493, 496 (D SC 1998); Dodd-Anderson v Stevens, 1993 WL 273373 (D Kan 1993)

(Appendix E); Wyatt & Bales, The Presence of Third Parties at Rule 35 Examinations (hereinafter "Wyatt"), 71 Temp L Rev 103 (1998).

Second, the presence of an attorney impairs the one-on-one communication necessary for an effective examination. E.g., Cabana, supra at 12; Abduwali v Washington Metro Area Transit Authority, 193 FRD 10, 13 (DDC 2000); Holland, supra at 495; Romano v II Marrow, Inc, 173 FRD 271, 274 (D Ore 1997); Wyatt, supra at 119-20.

Third, it is unfair to allow Plaintiff's attorney to attend the examinations in question where Defendant is not afforded the same opportunity with regard to examinations performed by doctors whom Plaintiff intends to call as witnesses. E.g., Cabana, supra at 12; Holland, supra at 495-96; Wyatt, supra at 118.

Finally, if Plaintiff's attorney attends, he may be disqualified from representing Plaintiff in the case because he may become a material witness. MRPC 3.7. This may occur if Plaintiff's attorney's cross-examination of the physician requires contradicting the physician's testimony on the basis of the attorney's own observations. E.g., Hertenstein, supra at 629; Holland, supra at 495; Dodd-Anderson, supra at 2; Wyatt, supra at 121-22.

Moreover, concerns about the examination becoming a de facto deposition with the examiner asking improper questions can be adequately addressed by less intrusive means. Plaintiff's attorney will have an opportunity to cross-examine the physician

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at trial, armed with information concerning the examination obtained from Plaintiff, from the physician's report, and from the physician's pre-trial deposition. E.g., Cabana, supra at 12; Abduwali, supra at 14; Wyatt, supra at 125-26. Furthermore, any admissions which the court deems improperly obtained can be excluded at trial. Hertenstein, supra at 629; Dodd-Anderson, supra at 2; Wyatt, supra.

Based on the foregoing, "the overwhelming majority of courts that have considered the issue have denied the examinee's request to have his attorney present during the examination." Wyatt, supra at 110. See also Cabana, supra at 12. An exception is appropriate only if Plaintiff can show "good cause":

> "To establish good cause, that party must submit 'a particular and specified demonstration of fact, as distinguished from stereotyped and conclusory statements.'"

Hertenstein, supra at 624.

The mere fact that the defendant has hired the examiner is not a sufficient showing. Hertenstein, supra at 633; Galieti v State Farm Mutual Automobile Ins Co, 154 FRD 262, 265 (D Colo 1994). The plaintiff must come forward with **evidence** demonstrating that the examiner may engage in impropriety, Hertenstein, supra at 333, or that some other "compelling need" exists, Abduwali, supra at 13; Hertenstein, supra at 634; Wyatt, supra at 129.

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B. PLAINTIFF HAS NOT SHOWN GOOD CAUSE FOR ALLOWING AUDIO/VISUAL RECORDING OF THE EXAMINATION.

Preservation

This issue was presented in the trial court in Defendant's Motion for Rehearing, Issue III.

Discussion

The same considerations of unnecessary intrusiveness discussed above also apply to the video recording permitted by the August 25 order. One court summarized the problems as follows:

> "Clearly, **the presence of a videographer could influence [the plaintiff]**, even unconsciously, **to exaggerate or diminish his reactions** to Dr. Westerkam's physical examination. [Plaintiff] could perceive the videotape as critical to his case **and fail to respond in a forthright manner**. In addition, **the videotape would give Plaintiffs an evidentiary tool unavailable to Defendant, who has not been privy to physical examinations made of Mr. Holland by either his treating physicians or any experts he may have retained**. Such a result undermines the purpose of Rule 35."

Holland, supra at 496 (emphasis added). See also Romano, supra at 274 (recording device would constitute a distraction during the examination and diminish the accuracy of the process).

Again, Plaintiff has not shown the existence of compelling circumstances, Holland, supra, which would warrant such an extremely disruptive intrusion into the examining room. As with the presence of counsel, allowing the videotaping of the examination is neither legally nor factually warranted.

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C. EVEN IF MCR 2.311 ALLOWED THE COURT TO IMPOSE CONDITIONS, PRECLUDING THE EXAMINERS FROM ASKING QUESTIONS THEY DEEM NECESSARY TO DETERMINE PLAINTIFF'S CONDITION WILL MATERIALLY AND ADVERSELY AFFECT THE ACCURACY AND CREDIBILITY OF THE EXAMINATION RESULTS.

Preservation

This issue was presented in the trial court in Defendant's Motion for Rehearing, Issue IV.

Discussion

Of all of the conditions imposed by the August 25 order, this one may be the most absurd. The pertinent decisional authority establishes beyond question that obtaining a **complete** history is an integral part of a medical examination, and that there is no adequate substitute for the examiner eliciting it himself from the subject.

> "To restrict a physician from questioning a patient during a physical examination unduly restricts the physician's ability to obtain the information necessary to reach medical conclusions. **The questioning of the plaintiffs by defense counsel during the taking of their depositions, the historical medical records, and the answers of the plaintiffs to interrogatories are no substitute for the answers to questions that a physician must pose to a patient during a physical examination. All of the questions** that a medical doctor needs to ask, in particular the follow-up questions, **cannot be determined in advance** of the medical examination."

Romano, supra at 273 (emphasis added).

> "We agree with these reasons given by the district court which, briefly stated are: (1) a medical history is a necessary and integral part of a medical examination; (2) such a medical history prepared by plaintiff's attorney, or any other person, may not be sufficient for a doctor's purpose in evaluating the patient's physical condition; (3) in order to give his

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> professional opinion the examining doctor must be allowed to elicit his own medical history because, **due to differences in training, experience, and background the author of such a previously prepared medical history may omit facts which are of vital significance to the examining physician**; (4) **no doctor should be required to give his professional diagnosis and opinion** as to a person's physical condition, pursuant to a court order, **without the right to elicit the medical history which he reasonably deems relevant and necessary for that purpose**."

Simon v Castille, 174 So2d 660, 666, app den, 176 So2d 145, cert den, 382 US 932, 86 S Ct 325, 15 L Ed 2d 344 (1965) (emphasis added). See also Krasnow v Bender, 78 Ill 2d 42; 397 NE2d 1381, 1384 (1979). All of the foregoing considerations apply with even more force to psychiatric evaluations.

The Court of Appeals blithely affirmed the imposition of this condition by noting that the examiner is not totally precluded from asking questions about medical history, and that "defendant had access to plaintiff's medical records". (Appendix J, p 8 & n 9). That analysis is both analytically and factually defective.

The problem with the condition is not that it totally precludes the doctor from asking medical history questions. It plainly does not. However, it does transfer the power to determine which questions are appropriate from a psychiatrist to the Plaintiff's attorney, who will surely interrupt any questioning which threatens to undermine his case.

As to supposed access to Plaintiff's medical records, the Court of Appeals apparently uncritically adopted that allegation

from Plaintiff's brief. The fact is that this 25-year-old Plaintiff spent the first 20 years of her life in **Albania**. (Appendix G, p 3). Translation problems aside, simply obtaining those records (if they exist) would be a daunting task.[6]

In sum, the Court of Appeals affirmed the imposition of intrusive conditions designed by the MTLA to impair the ability of defendants to obtain relevant medical information. The principle that doing so is now enshrined in a published opinion. This Court should not allow it to stand.

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[6]Perhaps Plaintiff's attorneys can be forgiven for this obvious slip. This is, after all, an MTLA-programmed argument intended to hamper discovery in a mass of cases. Defendant does not think that Plaintiff's attorneys intended to mislead the lower courts. It is more likely that they simply forgot to tailor the MTLA program to the particular facts of the case.

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III. AN ISSUE FIRST PRESENTED IN A MOTION FOR REHEARING FILED WITHIN THE 21-DAY APPEAL PERIOD IS PRESERVED FOR APPELLATE REVIEW UNDER THE STANDARD OF REVIEW GENERALLY APPLICABLE TO SUCH ISSUES.

The Court of Appeals declined to address the conditions discussed in Issues II.A-B. for the following reason:

> "With regard to the first two conditions, Defendant waived any challenge to the conditions because its attorney agreed to these conditions if the court rule applied. Error requiring reversal must be that of the trial court, and not error to which an aggrieved party contributed by plan or negligence. *Phinney v Verbrugge*, 220 Mich App 513, 537; 564 NW2d 532 (1997). A party waives an issue by affirmatively approving of a trial court's action. *People v Carter*, 462 Mich 1206 [sic], 215-216; 612 NW2d 144 (2000).[8]"
>
> * * * *
>
> "[8]**Although Defendant**, through new counsel, **later challenged the trial court's decision in a motion for rehearing, Defendant's appeal brief fails to address the standards for rehearings. Defendant's failure** to brief this necessary issue **precluded appellate review**. *Roberts & Son Contracting, Inc v North Oakland Development Corp*, 163 Mich App 109, 113; 413 NW2d 744."

(Appendix J, p 7 & n 8) (emphasis added). The majority cited no authority for the proposition that a failure to address the standards for rehearings precludes appellate review in these circumstances.

Indeed, in light of the procedural history of this case, that holding is rather opaque. In the trial court, Judge Ziolkowski allowed a response to be filed to Defendant's Motion for Rehearing (Docket Sheet, Nos. 51, 53), conducted a hearing on the motion (9/19/03 Tr, 3), and specifically ruled on the merits of the issues presented (id., 13). In that context, it is difficult

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to fathom the meaning of the above-quoted passage. The applicable standard of review of the issues presented in the Court of Appeals was set forth at page iv. of Defendant-Appellant's Brief on Appeal.

The opacity of the opinion on that point highlights a perennial problem in the Court of Appeals: The lack of a coherent standard governing the review of issues raised in the trial court on rehearing. Understanding that problem requires an appreciation of the practical function of motions for rehearing.

The pertinent Court Rule reads as follows:

> "Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error."

MCR 2.119(F)(3).

The purpose of that Rule is to provide a procedural device for the prompt correction of plainly erroneous results at the trial court level. Bers v Bers, 161 Mich App 457, 462-63 (1987). That is consistent with the overall purpose of the Court Rules "to secure the just, speedy, and economical determination of every action". MCR 1.105.

It is worth noting that Rule 2.119(F)(3) expressly contemplates that new issues will be presented, and that the motion should be granted if the new issues or material demonstrate that a wrong result was reached originally. E.g., Blevins v Abraitis,

Court of Appeals No. 252947 (rel'd 8/25/05; unpublished) (Appendix K), p 4.

Issues presented in a motion for rehearing filed within the original 21-day appeal period are preserved for appellate review regardless whether the trial court rules on them. See Family Independence Agency v Davis, 264 Mich App 66, 71-72 (2004); Bers, supra at 462-63; Blevins, supra.[7] The applicable standard of appellate review obviously depends on the nature of the issue. For example, a question of law raised on rehearing is subject to

[7]There exists a peculiar exception to that principle in appeals from rulings on summary disposition. Case law from this Court holds that material submitted on rehearing will not be considered by an appellate court in reviewing the propriety of the ruling on the summary disposition motion. Maiden v Rozwood, 461 Mich 109, 126 n 9 (1999); Quinto v Cross & Peters Co, 451 Mich 358, 366 n 5 (1996). The rationale for such a rule is not evident given the purpose of a motion for rehearing and the directive to interpret the Court Rules to reach just results.

Not surprisingly, the legal pedigree of the rule is suspect. Maiden cited no authority at all. Quinto cited Apfelblat v National Bank of Wyandotte-Taylor, 158 Mich App 258, 263 (1987), which held that in ruling on a motion for summary disposition, a trial court is only obliged to consider the then-available evidence. (It is difficult to see how a court could be expected to consider unavailable evidence.) Apfelblat cited Spectrum Manufacturing Corp v Bank of Lansing, 118 Mich App 25, 31 (1982), which held that a court must consider all material available to it.

Neither Maiden nor Quinto articulate a line of reasoning connecting those principles with the conclusion that an appellate court should ignore material produced on rehearing which demonstrates that a wrong result was reached. Affirming a demonstrably erroneous result where the error was promptly brought to the attention of the trial court appears to serve no legitimate systemic purpose.

This particular anomaly is not applicable in the instant case. Defendant presents it here only to underscore the apparent lack of rationality and consistency of the law in this area.

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de novo review. Family Independence Agency v Davis, supra, 71-72.

Despite all of that, there are a plethora of cases asserting that denial of a motion for rehearing is reviewed for abuse of discretion. E.g., Ensink v Mecosta County General Hospital, 262 Mich App 518, 540 (2004); Blevins, supra, 4; Caron v Walmart Stores, Inc, Court of Appeals No. 254915 (rel'd 5/31/05; unpublished) (Appendix L), p 5; Family Independence Agency v Wells, Court of Appeals Nos. 247504, 247962 (rel'd 10/28/03; unpublished) (Appendix M), p 2; Freund v Silagy, Court of Appeals No. 228974 (rel'd 5/14/02; unpublished) (Appendix N), p 5.

The only mention of discretion in Rule 2.119(F)(3) is to the effect that the trial court has discretion to revisit the same issues already presented if it so chooses. The Rule cannot rationally be construed to impart discretion to affirm a previous decision in the face of a new issue or material demonstrating that the wrong result was reached.

There is also authority for the paradoxical proposition that a trial court does not abuse its discretion in denying a motion for rehearing if the newly presented issues or facts could have been presented prior to entry of the original order. Charbeneau v Wayne County General Hospital, 158 Mich App 730, 733 (1987); Bertling v Allstate Ins Co, Court of Appeals No. 198952 (rel'd 3/3/98; unpublished) (Appendix O), p 3. That rule has no basis in the language of Rule 2.119(F)(3), nor is it consistent with the evident purpose of that rule.

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The instant case illustrates the mischief that can be wrought because of the lack of a reasoned, coherent statement from this Court on the status of issues raised for the first time on rehearing. Rather than reviewing the issues, the majority in the instant case simply declined to address them because Defendant's brief "fails to address the standards for rehearing" -- whatever that means in this context.

The remedy is for this Court to hold that:

(1) Issues presented in motions for rehearing filed within the original 21-day appeal period are preserved for appellate review under the standards generally applicable to the issues in questions; and

(2) A trial court has no discretion to affirm a result which is demonstrably legally or factually erroneous.

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REASONS FOR GRANTING LEAVE TO APPEAL

This Court should grant leave to appeal or other relief for several good reasons.

First, the Court of Appeals' decision subverts §3151's legislatively conferred right of a no-fault insurer to a mental or physical examination of a claimant. All that a claimant need do to avoid the right to an unconditional examination is to file suit. Once that is done, the plaintiff's attorney can limit the examination simply by having the MTLA template order entered and exercising his right "to intercept communications between the Plaintiff and the defense medical examiner, in the same manner as if the Plaintiff's deposition were being taken and if the communications are in violation of this order". (Appendix A, ¶12).

Needless to say, that device is unlikely to be invoked by claimants with plainly genuine claims. Rather, the main beneficiaries of the ploy will be those with the questionable or fraudulent claims of the type which most generally engender the hyperaggressive litigation tactics exemplified by the order here at issue. As Judge Donofrio pointed out, "This is the kind of stuff that comes out when you have a piece of crap as a case . . . ." (Appendix D, p 9). The tool provided by the Legislature to detect such claims is thus blunted by judicial fiat in precisely those cases in which it is most needed.

Second, in tort actions the systemic disruption of a defendant's ability to discover a plaintiff's medical condition is now enshrined in a published opinion of the Michigan Court of Ap-

peals. As pointed out above, protection of a plaintiff may be warranted upon a particularized showing of facts demonstrating that the proposed examiner has a long history of abusive practices. However, in the absence of such a showing, seeking conditions such as we have here is pure, systemic obstrutionism.

"This is not advocacy, this is gamesmanship."

* * * *

"This is an indiscriminate use of an abusive process. . . ."

(Appendix D, p 9).

As the instant case illustrates, relying on the unfettered and undirected discretion of trial courts is no safeguard against such disruption. Whether a defendant will have a reasonable opportunity to discover the plaintiff's medical condition now depends upon whether the trial court has bought into the MTLA's propaganda that no one paid by a defendant can be trusted to conduct an examination without serious, material abuses. Requiring a showing of necessity for conditions such as were imposed here will at least inject some rationality into the process.

Third, in the worst case, the widespread imposition of the MTLA conditions will shrink the pool of physicians willing to conduct physical or psychiatric examinations for defendants. For example, some examiners might not find it worthwhile to conduct examinations if they have to keep on file three years of 1099's (Appendix A, ¶1), to disrupt their offices and examinations with videotapes and formal introductions (id., ¶¶2, 5), to allow his

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examination to be interrupted by the plaintiff's attorney whenever the latter can fashion an argument that a question is inappropriate (id., ¶12), or to be forbidden from asking for "information that may be required" for a proper diagnosis (id., ¶16).

Finally, the instant case provides a vehicle for this Court to provide some long overdue guidance to lower courts as to issues raised in motions for rehearing and appellate review of such issues.

In sum, the instant case presents one issue of judicial abrogation of legislative prerogative (Issue I.), one issue implicating the opportunity for a meaningful and unobstructed evaluation of a plaintiff's physical or mental condition (Issue II.), and one issue presenting an opportunity to remedy a perennial procedural irrationality which ultimately allows courts to affirm erroneous results despite a litigant's adherence to the procedure intended to correct such results. This case is worthy of this Court's attention.

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